IN THE UNITED STATES COURTS OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS
No. 06-170V
Filed: February 14, 2007
Not for Publication

ANITA REINO, parent of ANGELA REINO, a minor	*	
	*	Attorney Fees & Costs;
Petitioner,	*	Billing Increments;
	*	Ministerial Tasks
v.	*	
	*	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	

DECISION ON ATTORNEY FEES AND COSTS

Vowell, Special Master:

On November 30, 2006, I issued a decision adopting the parties' stipulation and awarding compensation in this case. A joint notice not to seek review was filed on December 4, 2006. Judgment was entered on December 5, 2006.

On October 31, 2006, petitioner submitted a somewhat premature Application for Fees and Costs ["Fee Application"], requesting attorney fees in the amount of $8,721.50; attorney costs of $308.29; and petitioner's costs of $5,500.00[1] for a total of $14,529.79.

A response to the Fee Application was filed by respondent on November 27, 2006. Respondent noted that the attorney and paralegal hours documented did not appear to be excessive, but nevertheless objected to compensation for certain "ministerial tasks, such as reviewing orders and correspondence, filing an entry of appearance, and placing phone calls." Opposition to Petitioner's Request for Attorney's

[1] The General Order # 9 statement delineating costs borne by counsel and costs borne by petitioner was not filed until November 7, 2006.

Fees and Costs ["Fee Opposition"], p. 2.[2] Respondent also objected to $5,250.00[3] of the $5,500.00 claimed in petitioner's costs to establish and administer a guardianship for her minor daughter. I need not resolve the objection to petitioner's costs, as on January 19, 2007, petitioner withdrew the request for fees related to the guardianship, leaving a total of $250.00 in costs incurred by petitioner directly. Respondent does not oppose the application for this $250.00 in costs.

Although respondent did not specify the specific amounts of attorney and paralegal time to which he objects, it appears from the detailed bill attached to the Fee Application that respondent challenges approximately $255.50 in paralegal fees and $390.00 in attorney's fees. Respondent asserts that the court may not approve payment for "ministerial tasks such as reviewing orders and correspondence, filing an entry of appearance, and placing phone calls." Fee Opposition, p. 2.

Respondent's objection is not frivolous, but in the context of the program in general and this case in particular, it is not well-founded. Someone must review orders, if only to calendar deadlines. Someone must talk with the client occasionally, bringing her up to date on her case. Someone must review medical records received to ensure they are complete and relevant to this petitioner's case. Someone must draft and review motions, talk with opposing counsel, and talk with court personnel. Respondent does not appear to be objecting that the tasks listed for the dates concerned should have been performed by a secretary, whose services would ordinarily be attributed to overhead costs. Rather, respondent's objection is that these services are "ministerial" in nature and involved only short periods of time, billed in one or two tenths of an hour. Respondent does not challenge the hourly rate claimed for either paralegal or attorney time.

This court applies the lodestar method to any request for attorney's fees and costs. The "initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *See Blanchard v. Bergerson*, 489 U.S. 87, 94 (1989) (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984)). In determining the number of hours reasonably expended, a court must exclude hours that are "excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). Ordinarily, an attorney should not bill for attorney time for tasks that a paralegal should perform, nor should he bill for paralegal time when the tasks involved are of a secretarial nature. *See, e.g., Plott v. Sec'y HHS,* No. 92-0633V, 1997 WL 842543 *4-5

[2] The specific dates containing billing entries to which respondent objected to are found in footnote 2 of the Fee Opposition.

[3] Petitioner actually requested $5,500.00 in her individual costs; respondent's Fee Opposition references $5250.00 in costs. The difference is the $250.00 filing fee, to which respondent apparently interposes no objection.

(Fed. Cl. Spec. Mstr. April 23, 1997). Special masters may rely on their experience with the Vaccine Act in order to determine if the hours expended are reasonable. *Wasson v. Sec'y, HHS*, 24 Cl. Ct. 482, 486 (1991), *aff'd*, 988 F.2d 131 (Fed. Cir. 1993). Under the Guidelines for Practice under the National Childhood Vaccine Injury Compensation Program ["Guidelines for Practice"], petitioners' counsel are instructed to maintain contemporaneous time records that indicate the date and character of the service performed, the number of hours (or fractions of hours) expended, and the identity of the person performing them. These guidelines encourage separate, rather than "lumped" entries, in order to better assess the reasonableness of a fee request. *See* Guidelines for Practice, Section XIV(A)(3).

My review of the billing worksheet attached to petitioner's Fee Application indicates that each of the challenged entries is an appropriate use of time for the paralegal or the attorney to whom the work is attributed. Simply because a telephone call to the client or a health care provider lasted only a few minutes does not mean that it should have been handled by a secretary or that it was unnecessary. Likewise, because an experienced attorney reviewed a filing in a few minutes does not mean that the review should be attributed to overhead.

I am mindful that some of my colleagues have disallowed small periods of attorney time attributed to time spent by an attorney reviewing notices of appearance by opposing counsel, orders reassigning a case to another special master, and orders setting due dates for matters to be filed by opposing counsel. Respondent's Fee Opposition, p. 2, n. 3, cites to several attorneys' fee cases in which the special master questioned or disallowed the time spent by attorneys in reviewing filings such as notices of appearance or case reassignments.[4] However, these cases are support only for the proposition that such tasks are ministerial for an attorney, not for a paralegal.

To the extent that my colleagues still hold the opinion that billing small amounts of time for such tasks in the context of a reasonable request for attorneys' fees is improper, I respectfully disagree with them. As Special Master Abell noted in *Isom v. Sec'y, HHS*, No. 94-770V, 2001 WL 101459 *2 (Fed. Cl. Spec. Mstr. Jan. 17, 2001), reviewing court orders is not necessarily a ministerial task. I do not consider review of court orders to be "ministerial."

I recognize that I am not compelled to conduct a line by line analysis of petitioner's application for fees and costs. I have, however, chosen to address the challenged attorney time to indicate why I conclude the contested items are not

[4] Respondent cites to *Baker v. Sec'y, HHS*, No. 89-111V, 1992 WL 138379 (Cl. Ct. Spec. Mstr. May 29, 1992), *Watson v. Sec'y, HHS*, No. 91-1354V, 1992 WL 181022 (Cl. Ct. Spec. Mstr. July 2, 1992), *Johnson v. Sec'y, HHS*, No. 90-645V, 1992 WL 247565 (Cl. Ct. Spec. Mstr. Sept. 14, 1992), *Barnes v. Sec'y, HHS*, No. 90-1101V, 1999 WL 797468 (Cl. Ct. Spec. Mstr. Sept. 17, 1999), and *Parks v. Sec'y, HHS*, No. 90-268V, 1991 WL 146242 (Cl. Ct. Spec. Mstr. July 18, 1991).

ministerial in nature.

In a program in which special masters, rather than juries, decide causation and compensation, the identity of the special master assigned is undoubtedly a factor in the approach an attorney takes in presenting and proving his case. I note that on March 14, 2006, when petitioner's counsel billed .10 hour (six minutes) for review of a faxed notice of assignment, I was one of three special masters newly appointed to this court.

Likewise, on March 27, 2006, when petitioner's counsel billed .10 hour to review his motion to substitute for a pro se petitioner, such review is not ministerial. While a paralegal may draft and file such motions, the attorney responsible has an obligation to review them. The same rationale applies to the challenged entry for March 30, 2006, in which counsel bills .10 hour for reviewing a motion, presumably the motion for a subpoena that a paralegal spent .20 hour in drafting on that same date.

In a program where respondent is represented by a small number of attorneys, spending a few minutes ascertaining the identity of opposing counsel is not unreasonable, particularly when the Department of Justice took a month to appoint an attorney to represent the Secretary of the Department of Health and Human Services in this matter. Thus, I find the challenged entry on April 7, 2006 for .10 hour of attorney time to be a reasonable and compensable expense.

A billing entry for .10 hour on April 24, 2006 for review of an order designating the case as electronic is reasonable and compensable. I find the entries on April 27 and 28, 2006 regarding review of the order granting electronic filing and the notice designating the case as electronic to be compensable as well. Electronic cases require alterations in the manner in which all future documents and motions are to be filed; noting such alterations for the benefit of the other attorneys in the firm and the support staff who might make future filings is a reasonable expenditure of a small amount of attorney time.

Respondent also challenged petitioner's bill for .10 hour of attorney time to review the status of the medical records in this case. Such a challenge borders on the frivolous. In a program where entitlement decisions may be based on records alone and in a case in which the original petition was filed pro se and without all the statutorily required supporting documents (*see* Order, dated March 14, 2006), an attorney's quick review of the status of these supporting documents is eminently reasonable and compensable. Respondent also challenges the bill for .10 hour on May 3, 2006 to review the March 14, 2006 order directing the filing of supporting documents. This review took place on the same day a paralegal filed seven exhibits in this case and on the same day I conducted a status conference to discuss this previously pro se petitioner's failure to comply with the order of March 14, 2006. A review of my order was thus not "ministerial" in nature.

In yet another challenge, respondent contends that the May 16, 2006 review of

my scheduling order of May 4, 2006 falls under the category of a "ministerial task." Respondent likewise challenges .10 hour billed on June 7, 2006 to review my scheduling order of June 6, 2006 and .10 hour billed on July 18, 2006 to review my scheduling order of July 17, 2006. None of the decisions of other special masters cited by respondent support a "ministerial" characterization of reviews of scheduling orders. I expect that attorneys representing petitioners under the Vaccine Act will read and comply with scheduling orders. While some attorneys may chose to delegate such tasks to paralegal support staff, it is the attorney who risks penalties to himself or his client if such orders are overlooked or ignored. It appears that the amount of time devoted to this review (six minutes in each case) triggered respondent's objection. Fee Opposition, p. 2 ("Most such entries are billed in increments of .1 hours and .2 hours"). Petitioner's counsel should hardly be penalized for his experience in the program and his billing in tenth of an hour increments, particularly when, as respondent concedes, the overall attorney hours expended and billed (12.8 hours) in this case are very reasonable.

This case was concluded based on a negotiated settlement between petitioner and respondent. Respondent's Rule 4(c) report did not directly challenge causation; rather, respondent contended that petitioner had failed to provide sufficient records to determine if petitioner's condition (a scar) had persisted for longer than six months and photographs to establish the extent of the of the injury. The Rule 4(c) report consisted of three pages. Respondent now challenges a telephone call from petitioner's counsel to respondent and a review of the Rule 4(c) report, together constituting .20 hour, and made on the same day respondent's report was filed. This challenge is absurd. Once again, it appears that respondent's challenge is based on the amount of time involved, rather than the nature of the activity conducted.

Finally, respondent challenges petitioner's counsel's short conversation with his client on July 18, 2006, also apparently based on its duration. I note that respondent does not challenge two longer conversations billed on July 20, 2006. Placed in the context of my comments during the Rule 5 Status Conference I conducted on July 14, 2006 (in which I urged the parties to settle this case and noted that the measure of any damage award was not likely to be very high, given the nature of the injury and the evidence submitted), I would expect petitioner's counsel to converse with his client. A short conversation is still an expenditure of attorney time and attention. In the context of a reasonable demand for attorney's fees, it is compensable, regardless of its duration.

I find the petition in the instant case was brought in good faith and that there existed a reasonable basis for the claim. Pursuant to 42 U.S.C. § 300aa–15(b) and (e)(1), I find that the figure of $9279.79 requested in attorneys' fees and costs and

petitioner's costs[5] for matters pertaining to petitioner's case is reasonable and appropriate, broken down as follows:

(1) A lump sum of $9029.79, in the form of a check payable jointly to petitioner and petitioner's counsel, Mr. Ronald Homer of Conway, Homer & Chin-Caplan, PC, for petitioner's attorney fees and costs; and

(2) a lump sum of $250.00 in the form of a check payable to petitioner for her own litigation costs.

Therefore, in the absence of a motion for review filed in accordance with RCFC Appendix B, the Clerk of the Court is directed to enter judgment in accordance with this decision.[6]

IT IS SO ORDERED.

s/ Denise K. Vowell
Denise K. Vowell
Special Master

[5] This amount is intended to cover all legal expenses. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered. Furthermore, 42 U.S.C. § 300aa-15(e)(3) prevents and attorney from charging or collecting fees (including costs) that would be in addition to the amount awarded herein. *See generally, Beck v. Sec'y, HHS*, 924 F.2d 1029 (Fed. Cir. 1991).

[6] Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by the U.S. Court of Federal Claims.